Supreme Court, U.S.
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No. 86-783

In The
Supreme Court of the United States
October Term, 1986

CYRIL H. WECHT, M.D., J.D.
Former Coroner,

Petitioner,

vs.

ALLEGHENY COUNTY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. WHETHER THE COURT MAY ASSUME JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3) WHEN THE PETITIONER'S CONSTITUTIONAL CLAIM OF THE DENIAL OF DUE PROCESS WAS NEVER PRESENTED TO THE COURT BELOW.

II. WHETHER THE PETITIONER HAS PRESENTED ANY BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.1(b)(c).

III. WHETHER THERE IS A BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI IN A PURELY STATE MATTER INVOLVING INTERPRETATIONS OF STATE STATUTES REGARDING THE CONDUCT OF PUBLIC OFFICIALS.

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STATEMENT OF THE CASE

This matter is before the United States Supreme Court on the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania filed by Cyril H. Wecht, M.D., J.D.

This matter arises out of a judgment entered in the Court of Common Pleas of Allegheny County which was affirmed by the Commonwealth Court of Pennsylvania. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal filed by Dr. Wecht.

The Petitioner was the duly elected Coroner of Allegheny County, Pennsylvania and served as Coroner of Allegheny County from January, 1970 to January, 1980. Petitioner established a checking account at the Mellon Bank and Trust Company on January 19, 1970. This account was titled "Cyril H. Wecht, M.D., 542 Fourth Avenue, Pittsburgh, PA 15219." Petitioner established a checking account at Mellon Bank and Trust Company on or about February 5, 1974 entitled "Cyril H. Wecht, M.D., 542 Fourth Avenue, Pittsburgh, PA 15219." In February, 1979, Dr. Wecht established yet another account at Mellon Bank, N.A. entitled "Professional Education Fund." The Petitioner had control and authority over the Mellon Bank accounts which authority included disbursements made from said accounts.

Petitioner, in his capacity as Coroner of Allegheny County, directed and authorized the performance of post-mortem examinations and toxicology specimen testing for Coroners of other counties in Pennsylvania to be performed at the Allegheny County Coroner's office by employees of Allegheny County during their normal work day using equipment, slides and materials owned by Allegheny

County. Revenues generated by such autopsies and related histologies/toxicology testing performed at the Allegheny County Morgue as stated above were deposited in the Mellon Bank accounts maintained by the petitioner as above identified.

This activity was never reported to the Board of County Commissioners, the governing authority of Allegheny County, and that body never authorized the performance of post-mortem examinations or toxicology specimen testing and related services for out-of-county Coroners and hospitals to occur at the Coroner's office using County equipment, employees, facilities, supplies and materials. Furthermore, the Commissioners never authorized the Petitioner to deposit the revenue of this business venture in his personal bank accounts. Out-of-county hospitals and Coroners for which services were rendered were billed by the Coroner's Office of Allegheny County. They were directed to make payments to Cyril H. Wecht, Coroner of Allegheny County. Dr. Wecht, rather than reporting the receipts on his transcript fee account or turning the same over to the County of Allegheny, deposited said funds in his private bank accounts and made disbursements from same at his discretion.

The Petitioner owned Pittsburgh Pathology and Toxicology Laboratory, Inc., a private business corporation which existed under the laws of the Commonwealth of Pennsylvania. One of the business purposes of this corporation was the processing, testing and examination of clinical specimens for physicians and hospitals. Histology specimens accepted by this laboratory were delivered to the Allegheny County Morgue under the control of the Peti-

tioner as Coroner for testing from 1970 through 1978. This laboratory received fees, as the result of histology services rendered and performed at the Allegheny County Coroner's Office using employees, equipment, materials and supplies of Allegheny County. The Petitioner failed to report this practice to the County Controller or the Board of Commissioners and failed to pay Allegheny County for the histology services performed by these employees using County equipment and material and supplies, which services were rendered solely on behalf of the Pittsburgh Pathology and Toxicology Laboratory.

During County Salary Board meetings from 1970 through 1979 and while seated as a member pursuant to the Second Class County Code, 16 P.S. § 4825, the Petitioner failed to disclose that he maintained private bank accounts in which he deposited fees generated, which were neither reported nor turned over to the County Treasurer. The Petitioner withheld information from the Allegheny County Salary Board, during its meetings at which Petitioner was seated as a member as Coroner, regarding private salary arrangements he made with his then Chief Pathologist Dr. Joshua Perper or other additional compensation arrangements he developed with other employees of the Morgue who performed work related to the out-of-county autopsies, private autopsies and histology/toxicology testing. The Petitioner failed to obtain authorization from or approval by the County Board of Commissioners for use of the Morgue, its facilities, equipment and supplies as well as the utilization of county employees in the performance and testing services for the laboratory owned by a corporation of which he was sole shareholder. Petitioner further failed to report to the Allegheny County

Controller as required by the Second Class County Code, 16 P.S. § 4802, any of the fees received by his solely-owned corporation from 1970 through 1978 in performance of the services which formed the basis of the Lynch surcharge. The Petitioner failed to report to the Controller as required by said Second Class County Code, any of the fees received by him in 1979 in performance of the services which formed the basis of the Lucchino surcharge. The Petitioner further withheld payment to Allegheny County of all fees generated by him in performing autopsies for out-of-county Coroners, histology/toxicology testing and private autopsies at the Morgue. A non-jury trial was held in the Court of Common Pleas of Allegheny County and on May 10, 1983, the Court entered an opinion surcharging the Petitioner $172,410.99. After the filing and consideration of exceptions to the May 10, 1983 opinion the Court on September 8, 1983 issued an opinion increasing the surcharge to $252,462.03.

The Petitioner filed an appeal to the Commonwealth Court of Pennsylvania which affirmed the September, 1983 decision on March 5, 1985. Pursuant to the Judicial Code of Pennsylvania, Dr. Wecht filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The Supreme Court denied said petition on August 18, 1986.

On November 14, 1986, the Petitioner filed the instant petition with this Honorable Court.

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ARGUMENT

I. THE COURT MAY NOT ASSUME JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3) WHEN THE PETITIONER'S CONSTITUTIONAL CLAIM OF THE DENIAL OF DUE PROCESS WAS NEVER PRESENTED TO THE COURT BELOW.

A Petition for a Writ of Certiorari must fail when the alleged unconstitutionality of the state statute was never presented to or considered by the highest state court having jurisdiction over the matter. The Supreme Court may exercise jurisdiction pursuant to 28 U.S.C. § 1257(3) only if the record affirmatively demonstrates that the constitutionality of the state statute was raised in the proceedings below and the highest state court in entering its decision was required to consider the federal question for a determination of the case, *U.S. ex. rel. Herge v. Commonwealth of Pennsylvania,* 89 F. Supp. 636 (D.C. Pa. 1950).

The case at bar fails to meet either of the criteria stated in that this Petitioner did not challenge the constitutional validity of the Act of May 15, 1945, P.L. 538, formerly 65 P.S. § 191-192 or the Act of October 4, 1978, P.L. 883, 65 P.S. § 401 *et seq.* Throughout the extensive and lengthy proceedings before the trial court and the appellate proceedings, the Petitioner did not raise any constitutional issue. Rather, the heart of the Petitioner's case was that the courts' interpretation of the statute was incorrect as applied to his activities as County Coroner. The Petitioner consistently sought to carve out an exception for himself as to the state courts' interpretation of the applicable statutes. The record is void of any allegation that the Petitioner was denied due process.

In order to restrict the court's mandatory jurisdiction, this court has consistently refused to accept jurisdiction when the state court has not had the opportunity to review the federal question presented for the first time in a Petition for a Writ of Certiorari. *Minnick v. Gardner,* 292 U.S. 48, 54 S. Ct. 567, 78 L. Ed. 1116 (1934); Cert. granted, 291 U.S. 659, 54 S. Ct. 378, 78 L. Ed. 1047; *Wilson v. Cook,* 327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793; *Pennsylvania R. Company v. Illinois Brick Company,* 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796; Reh'g den'd, 297 U.S. 728, 56 S. Ct. 666, 80 L. Ed. 1011; and *Boughton v. Exchange Bank,* 104 U.S. 427, 26 L. Ed. 765 (1981). The Petitioner having failed to preserve any federal question in the proceedings below effectively deprives this court of jurisdiction and the Petition for Writ of Certiorari must be denied.

II. THE PETITIONER HAS PRESENTED NO BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 17.1(b)(c).

A reading of the Petition for Writ of Certiorari and the reasons contained therein fails to disclose any basis for granting the petition under the considerations set forth in Supreme Court Rule 17.1(b)(c). The essence of the Petitioner's case rests upon the denial of the exception contained in a state statute relating to surcharges, 65 P.S. 191.

The Petitioner has cited no authority, either in the state system or a federal decision which affords him a basis for relief. The primary authority cited by the Petitioner, *Marks v. United States,* 430 U.S. 188 97 S. Ct. 990,

51 L. Ed. 2d 260 (1977) and *Bouie v. City of Columbia*, 397 U.S. 347, 84 S. Ct. 1697 (1964) both deal with the retroactive application of a judicial standard in a *criminal* case. The Petitioner has cited no authority for the proposition that an alleged retroactive application of a standard in a *civil* case affords any basis for federal relief. A review of the applicable decisions in the state courts clearly reveals that it has been well-settled in Pennsylvania that the "Actual Loss Exception" is available only to parties acting under authority of law. As the trial court noted, the existence of legal authority for the attempted activity is critical for the application of that exception (Appendix C—Petition for Writ of Certiorari—pp. 45(a)-47(a)). *Davis v. Carbon County*, 369 Pa. 322, 85 A.2d 862 (1952); *Appeal of Yenerall*, 165 Pa. Super. 144, 67 A.2d 565 (1948).

It has been specifically found in the instant case that the activities of the Petitioner were beyond the authority of his office or "*ultra vires*". (Opinion of Commonwealth Court of Pennsylvania, Appendix B—Petition for Writ of Certiorari, p. 6(a)-fn. 12 p.9(a)). That being the case, it is well-settled in Pennsylvania law that the exception or defense the Petitioner seeks is simply not available to him under a long-standing series of Pennsylvania cases. (Opinion of Commonwealth Court of Pennsylvania, Appendix C—Petition for Writ of Certiorari, pp. 45(a)-47(a)). The Petitioner has demonstrated no federal authority for the proposition that a mere interpretation by a trial or appellate court of a long-standing precedent in state law affords the basis of any federal relief.

Moreover, in the second surcharge or the Lucchino surcharge, the statute in question does not contain a "Actual Loss Exception" and the arguments set forth by the

Petitioner with respect to that statute simply have no basis.

The Petition for Writ of Certiorari should be denied.

III. THERE IS NO BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI IN A PURELY STATE MATTER INVOLVING INTERPRETATIONS OF STATE STATUTES REGARDING THE CONDUCT OF PUBLIC OFFICIALS.

The arguments presented by the Petitioner to torture federal issues out of what are essentially state and local matters demonstrate clearly that there is simply no basis for federal intervention in the case at bar. A review of the lower court opinions in this case appearing in the appendices to the Petition for Certiorari, clearly demonstrates that this issue has been extensively litigated and briefed in the courts of Pennsylvania and the Supreme Court of Pennsylvania has declined to review those decisions which have consistently been against the position asserted by the Petitioner in those cases. As has been previously noted, the constitutional claim is being raised before this court for the first time.

The Appellate Courts of Pennsylvania, as has been demonstrated in this Brief, have spoken to this issue consistently many times. The Supreme Court of Pennsylvania found no important issue of first impression to justify the granting of an allowance of appeal under the statutes of Pennsylvania. It is respectfully submitted that no basis has been demonstrated for federal jurisdiction in this case either, and the Petition for Writ of Certiorari should be denied.

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CONCLUSION

The denial of the Petition for Allowance of Appeal by the Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court of Pennsylvania which merely upheld a long-standing line of Pennsylvania cases interpreting state statutes relating to the conduct of public officials in the course of their duties. A reading of these cases and the federal authority cited by the Petitioner reveals no federal issue for adjudication by this Court. For these reasons and the reasons stated within, the Petition for Writ of Certiorari to review the decision below should be denied.

Respectfully submitted,

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